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JUL 5 1945

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 317 91

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,

Petitioner,

against

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

POINT I—The decision in this case is not in conflict with local decisions inasmuch as it is governed by admiralty law and no question of local law is involved... 1

POINT II—The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings..... 2

POINT III—The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same subject 2

POINT IV—No authority or other reasons for granting petition are stated by petition and none in fact exists 2

ARGUMENT 2

CONCLUSION 8

CASES CITED

PAGE

Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377 6

Associated Cement Mfrs. v. Cory, 31 Times L. R. 442 5

Carlisle Packing Co. v. Sandanger, 259 U. S. 255 1

Fleming v. Palmer, 123 F. (2d) 749 8

George J. Goulandris, The, 36 F. Supp. 827 6

Graves v. Miami S. S. Co., 29 Misc. (N. Y.) 645 5

Hall-Scott Motor Car Co. v. Universal Ins. Co., 122 F. (2d) 531, 534 1

International Paper Co. v. The Gracie D. Chambers, 248 U. S. 387 6

Kawasaki v. Bantham S. S. Co., L. R. (1939) 2 K. B. 544 5

Kronprinzessin Cecilie, The, 244 U. S. 12 5

Kuhn v. Princess, 119 F. (2d) 704 8

Laurent Meeus, The, 133 F. (2d) 552 ..... 4, 6

Luckenbach S. S. Co. v. Grace & Co., 267 Fed. 676 5

Ocean Steamship Co. v. U. S. Steel Products Co., 239 Fed. 823 4

Paraffine v. McEverlast, 84 F. (2d) 335, 339 7

Pollard v. Vinton, 105 U. S. 7, 9 4

Standard Varnish Works v. The Bris, 248 U. S. 392 6

Styria, The, 186 U. S. 1 ..... 4, 5, 6

Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co., 31 F. (2d) 401, 402 1

Union Fish Co. v. Erickson, 248 U. S. 308 1

Wildwood, The, 133 F. (2d) 765 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1317

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,

Petitioner,

against

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

No question is presented by the petition for writ of certiorari justifying the granting of such petition.

POINT I

The decision in this case is not in conflict with local decisions inasmuch as it is governed by admiralty law and no question of local law is involved.

Union Fish Co. v. *Erickson,* 248 U. S. 308;
Carlisle Packing Co. v. *Sandanger,* 259 U. S. 255;
Tatsuuma Kisen Kabushiki Kaisha v. *Robert Dollar Co.,* 31 F. (2d) 401, 402;
Hall-Scott Motor Car Co. v. *Universal Ins. Co.,* 122 F. (2d) 531, 534.

POINT II

The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

POINT III

The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same subject.

POINT IV

No authority or other reasons for granting the petition are stated by petitioner and none in fact exists.

ARGUMENT

This case involves the right of a shipowner under a maritime contract of bill of lading to receive and retain prepaid freight, under the provisions of an appropriate bill of lading clause, the voyage having been delayed and ultimately frustrated by the act of the United States Government in requisitioning its vessel, *M. S. Dona Aniceta,* after the cargo had been loaded but before the vessel had departed.

The clause in question reads:

> "Freight for the said goods to be paid by the shippers on delivery of Bills of Lading, in cash without deduction.
>
> "Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the carrier, cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere; * * *."

The validity of the prepaid freight clause was not questioned by the Circuit Court or by petitioner (Rec., p. 669).

The shipment of glassware in question was to have moved from New York City to ports in the Philippine Islands and Hong Kong on the scheduled December 8, 1941, sailing of respondent's *M. S. Dona Aniceta.*

Respondent's witnesses testified by deposition that petitioner's cargo was loaded from the dock into respondent's *Dona Aniceta* during the period from December 6 to noon, December 8, 1941 (Rec., pp. 309-327c). The veracity of these witnesses is apparent from a casual reading of their depositions. *It was stipulated and agreed by and between counsel for each of the parties that petitioner's cargo was loaded between 1 P. M., December 7, and noon, December 8, 1941* (Rec., pp. 566, 589).

The sailing of the vessel on December 8, 1941, was delayed that day by temporary refusal of clearance and on following days by orders from the United States Maritime Commission to arm and degauss the vessel. The voyage was frustrated on December 31, 1941, by orders of the United States Maritime Commission to discharge all cargo and to charter the vessel to the Maritime Commission.

As the Circuit Court of Appeals found, it became necessary to discharge and warehouse petitioner's cargo of glassware on December 31st, when the ship "was requisitioned for the Government through the War Shipping Administration and ordered to discharge her cargo" (Rec., p. 669).

Although petitioner, a man of experience in Far Eastern affairs (Rec., pp. 416-C), was as fully informed of the diplomatic and belligerent status of Japan and the United States as was respondent, petitioner issued no instructions to the respondent to refrain from loading his cargo. His position was precisely the same as that of numerous other shippers to which respondent owed an obligation to transport, none of whom gave any instructions not to load their merchandise (Rec., p. 670), several requesting that the loading be completed.

It is conceded by the petitioner that the *Dona Aniceta* was a Philippine vessel and the respondent was a Philippine corporation. Respondent's responsible officials at all times until December 31, 1941, when the vessel was requisitioned by the United States, intended to sail the vessel on her voyage. These officials relied upon many reports in the press that shipping in the Pacific would be normal or increased (Rec., pp. 532, 543) and on the news that the Philippines had not been affected at the time of their decision.

The Circuit Court of Appeals concluded, on the authority of *Ocean Steamship Co.* v. *U. S. Steel Products Co.* (C. C. A. 2), 239 Fed. 823; *Pollard* v. *Vinton,* 105 U. S. 7, 9, and *The Laurent Meeus,* 133 F. (2d) 552, that in effect it made no difference, so far as concerned the principles of the case, whether the cargo was loaded before or after the so-called attack on Pearl Harbor:

> "We find it unnecessary to appraise the effect of the dock receipts" (Rec., p. 670).

If it was reasonable for the petitioner to believe that the *Dona Aniceta* would sail on the voyage under the circumstances which prevailed prior to loading the cargo, it is obvious that petitioner cannot recover. Realizing that the respondent was not endowed with that prescience which petitioner seems to endeavor to force upon it, and that the matter must be considered from the viewpoint of the actors, *The Styria,* 186 U. S. 1, the Circuit Court of Appeals (Rec., pp. 670-674) found the actions of respondent's officials fully supported by the knowledge of the circumstances available to them and cited *The Styria, supra,* as authority for the proposition that it is appropriate for businessmen to rely upon knowledge current in their trade and upon publications shedding light upon the facts in which they are interested. In the present case the newspaper reports are of peculiar relevance because of the testimony of respondent's witnesses that their actions were guided, for the most part, by the information which they gleaned

from them. Since under the bill of lading and under legal authorities a "discretion" lies with the master and owner whether or not to abandon the voyage in the event of an extraordinary occurrence, it is obvious that within the sound discretion of the master and owner they may conclude either (a) that the circumstances necessitate an abandonment of the voyage, or (b) that the circumstances are not of such import as to permit them to do anything but to perform the contract of carriage and proceed with the voyage. In the present instance the Circuit Court of Appeals found that the case fell within the latter class.

The attack on Pearl Harbor did not mean to the respondent, nor to the petitioner, that the cargo which had been laden on the *Dona Aniceta* would not be moved, particularly since there were reports prevalent that ships would move in convoy and the vessel herself was instructed to arm and "institute defensive measures" (Rec., p. 668). Again, no report indicated that the vessel's Philippine ports had been affected by war (Rec., p. 287).

Petitioner apparently contends that any state of international affairs which may be considered a state of war, *ipso facto* constitutes a restraint on the performance of the voyage. Petitioner cites no authority for that proposition, but instead attempts to distort *The Styria, supra,* and *Kawasaki* v. *Bantham S. S. Co.* (1939), 2 K. B. 544, into decisions supporting that erroneous conclusion.

The mere fact that after the goods were delivered to the respondent a state of war ensued between the United States and Japan did not abrogate the contract of carriage nor excuse performance.

> *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, 267 Fed. 676, 679 C. C. A. 4, cert. den. 254 U. S. 644.
>
> *Associated Cement Mfrs.* v. *Cory*, 31 Times L. R. 442.
>
> *Graves* v. *Miami S. S. Co.*, 29 Misc. (N. Y.) 645.

The decision to sail, as here, or not to sail, as in *The Styria* and *The Kronprinzessin Cecilie*, is necessarily de-

pendent upon the multitude of assembled facts, each of which necessarily has a bearing upon the reasonableness. The absence of a vital determinative fact or the presence of another may mark the direction in which the decision falls. The respondent was bound to continue performance of the contract *unless prevented* by an excepted cause.

The record demonstrates clearly that petitioner had, in the form of continuous consultation with the carrier with regard to the status of his goods, ample opportunity to give such instructions as he deemed advisable; he failed to take advantage of such opportunity but, on the contrary, now, as a matter of afterthought, endeavors to place upon the carrier the obligation of making such a decision for him at the carrier's risk of choosing the decision which appeals to him.

The decision in this case and the principles involved therein is on all fours with the decisions based on similar facts in *The Laurent Meeus*, 133 F. (2d) 552, *The Wildwood*, 133 F. (2d) 765, *The George J. Goulandris*, 36 F. Supp. 827, *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, *International Paper Co.* v. *The Gracie D. Chambers*, id. 387, *Standard Varnish Works* v. *The Bris*, id. 392, and a contrary finding would do great violence to the principles upon which the shipping world generally proceeds. There is no need for any assumption that the question here involved is of first impression. It is not correct to say that "the Circuit Court of Appeals has decided contrary to the *dicta* of this Court in *The Styria*".

There is no conflict or variance between the decision in this Court and the decisions on the same principles of any other Court.

Judge Garrecht's dissenting opinion was obviously based upon his view that the Circuit Court of Appeals was bound by the finding below, "especially in cases where the important testimony is oral and where the trial judge had the opportunity to observe the witnesses and judge their veracity" (Rec., p. 675).

The basis for the dissenting Judge's conclusion is obviously erroneous as the *important* testimony was by deposition. The effect of the testimony of the few oral witnesses was largely cumulative. There was absolutely no testimony by deposition or in open court which opposed the finding of the Circuit Court of Appeals that respondent intended "to sail the vessel immediately upon completion of the New York loading unless instructions to the contrary were received either from American authorities or from Manila. Its conduct prior to the requisitioning of the ship is consistent only with the purpose to proceed with the scheduled voyage unless subsequent developments should prevent" (Rec. p. 671). A contrary finding by the District Court was completely unsupported by any evidence. In any event, there is no presumption in favor of a trial court's findings where all the substantial evidence to support them is produced by way of depositions or other writings. *Paraffine* v. *McEverlast*, 84 F. (2d) 335, 339.

The Circuit Court of Appeals was not, of course, bound to accept the findings of the District Court if it considered those findings clearly erroneous. F. R. C. P. Rule 52(a). In the present instance, the Circuit Court of Appeals stated in its opinion (R. p. 670):

> "With due deference to the opinion of the Trial Court, we are not able to agree that the responsible agents of the carrier acted arbitrarily in light of the facts coming to their knowledge while cargo was in process of being loaded."

Petitioner's entire case was based on a finding of unreasonableness by the District Court and, on the reversal of that finding, petitioner's entire case falls with it.

At page 6 of the petition and at page 19 of petitioner's brief it is claimed that the Circuit Court of Appeals had no right to reweigh the facts and apparently was bound by the findings of the District Court no matter how clearly erroneous they might be. Such a conclusion will not bear a moment's examination.

Fleming v. *Palmer*, 123 F. (2d) 749 (C. C. A. 1), cert. denied 316 U. S. 662.
Kuhn v. *Princess*, 119 F. (2d) 704 (C. C. A. 3).

The cases cited by petitioner do not support the proposition contended for.

Lumbra v. *U. S.*, 290 U. S. 551, and *Gunning* v. *Cooley*, 281 U. S. 90, were cases tried to a jury.

In *U. S.* v. *Ingalls*, 114 F. (2d) 839, it was said at page 842:

> "Where two different conclusions may reasonably be drawn from uncontroverted evidence, the question as to which should be drawn is for the trial court * * *."

It does not, of course, follow from the above statement that the Circuit Court of Appeals is bound to accept a conclusion of the District Court which it considers clearly erroneous.

Helvering v. *Johnson*, 104 F. (2d) 140, was a petition to review a decision of the United States Board of Tax Appeals and not an appeal from a decision of the District Court.

United States v. *Gamble-Skogmo, Inc.*, 91 F. (2d) 372, and *Columbia National Ins.* v. *Comfort*, 84 F. (2d) 291, were appeals heard in 1937 before the Federal Rules of Civil Procedure were in effect, and are consequently not in point.

CONCLUSION

It is respectfully requested that this Honorable Court deny the petition for writ of certiorari.

Dated: New York, N. Y., June 27, 1945.

Respectfully submitted,

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